BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KINDAL WILLOUGHBY Claimant	)	
V.	)	
WILLIAMS SEASONING Respondent	)	Docket No. 1,070,914
AND	)	
AMERISURE INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 7, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Mark E. Kolich of Lenexa, Kansas, appeared for claimant. Brian J. Fowler of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant's December 26, 2015, injury arose from a personal or neutral risk, and thus denied claimant's request for medical benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 6, 2016, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues, "[A]n injury occurring during a break is compensable so long as the activity engaged in at the time of the accident was not so 'unusual or unreasonable' that it clearly falls outside the conditions of employment. Smoking a cigarette in an area with the employer's knowledge and permission is neither 'unusual' nor 'unreasonable'."[1]

Respondent contends the ALJ's Order should be affirmed. Respondent argues claimant's injury arose from a personal risk. Further, respondent maintains claimant's

[1] Claimant's Brief (filed Apr. 18, 2016) at 7.

smoking a cigarette provided no reasonable benefit to either party and had naught to do with his job duties.

The issue for the Board's review is: did claimant's accidental injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked as a machine operator for respondent for nearly 20 years. On the morning of December 26, 2013, claimant took a paid, 15-minute break from his shift. Claimant explained respondent did not allow smoking on its premises. Claimant was required to go across the street, off the employer's premises, to smoke a cigarette. Claimant testified:

> A. Whoever smokes, they normally go off the property, and some people park on that street. So they go to their vehicles to smoke.
>
> . . .
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> Q. . . . [W]ere the supervisors at [respondent] aware of this practice of people going off the premises to have a smoke during the breaks?
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> A. I believe so, because I'd normally see some of [the supervisors] out there, too.[2]

Claimant described walking through the parking lot to speak with a coworker before walking to his car to smoke a cigarette. While en route to his car, claimant slipped on ice and fell backwards, landing with his back on the curb. Claimant testified he believed he was on respondent's property when he slipped and fell before sliding into the street, though he admitted he had no personal knowledge regarding actual ownership of the property.

Claimant sustained a comminuted left tibia fracture as a result of the fall. He was taken via ambulance to Overland Park Regional Medical Center, where he underwent surgery with Dr. Mark Humphrey. Dr. Humphrey repaired claimant's fracture with a rod and four screws. Claimant followed up with Dr. Humphrey post-surgery, noting one of the screws in particular was causing pain. Dr. Humphrey recommended claimant undergo screw removal. Claimant stated he has had no treatment for his left leg since Dr. Humphrey released him in August 2014.

Claimant initially paid for treatment through his group health insurance because respondent denied workers compensation liability. Claimant testified he no longer has a job and may lose his insurance as a result. Claimant has not worked since the accident. He received 26 weeks of short-term disability after the accident.

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[2] P.H. Trans. at 8-9.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(b) and (c) provide:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) provides:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(f) provides, in part:

(2) (B) An injury by accident shall be deemed to arise out of employment only if:

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include:

> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

> (C) The words, 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2013 Supp. 44-508(g) provides:

> 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2013 Supp. 44-508(f)(2)(B)(i) provides that an injury by accident shall be deemed to arise out of and in the course of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident. This provision was enacted as part of the extensive amendments to the Kansas Workers Compensation Act (Act) effective May 15, 2011.

K.S.A. 2013 Supp. 44-508(f)(3)(A)(ii) provides that the words "arising out of and in the course of employment" shall not be construed to include an accident or injury which arose out of a neutral risk with no particular employment or personal character. This provision represents a significant departure from prior decisions that include neutral risks as compensable.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[4]

ANALYSIS

The ALJ found claimant's injury by accident bore no relationship to his work and did not arise out of and in the course of employment. The undersigned agrees. The ALJ is correct in his observation that after the 2011 amendments to the Act, the focus has shifted

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[3] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[4] K.S.A. 2014 Supp. 44-555c(j).

to determine if the injury relates to the work performed.[5] The language contained in K.S.A. 2013 Supp. 44-508(f)(2)(B) stating an injury is only compensable if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident is plain and unambiguous.

When a workers compensation statute is plain and unambiguous, the Board must give effect to its express language rather than determine what the law should or should not be. The Board cannot not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[6]

Three cases involving cigarette breaks have been decided by the Board or Board Members since the 2011 legislative changes. In *LaTurner*,[7] a Board Member analyzed a fall while an employee was on a smoke break. The determination rested upon a failure to find a causal connection between the conditions under which the work was required to be performed and the resulting accident. In *LaTurner*, as in this claim, the employer prohibited smoking in its facility. Nothing about the claimant's job duties in *LaTurner* required her to be on the patio where she slipped and fell, except her desire to smoke. The patio area where the claimant fell was the property of the employer and was maintained by that employer. The claimant in *LaTurner* was on her lunch break and, unlike this claim, had clocked out.

In *Adams*,[8] as in this claim, the employer did not allow smoking on the premises. Claimant clocked out during her lunch break, which was required when leaving the building, and proceeded into the parking lot, intending to cross the street to the only area where smoking was allowed by respondent. As claimant walked through the icy parking lot, she fell. A video from respondent's security camera indicated claimant was at the driveway exit of the parking lot when she fell. The Board Member deciding the case denied the claim, finding nothing to establish a causal connection between the conditions under which claimant's work was required to be performed and the accident. The Board Member also found the accident arose out of a neutral risk or a personal risk not associated with the employment.

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[5] See *LaTurner v. Quaker Hill Nursing, LLC,* No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 5, 2012); *Adams v. Hospira, Inc.*, No. 1,069,056, 2014 WL 3055469 (Kan. WCAB June 12, 2014).

[6] See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009), citing *Graham v. Dokter Trucking Group,* 284 Kan. 547, 554, 161 P.3d 695 (2007).

[7] *LaTurner v. Quaker Hill Nursing, LLC,* No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 5, 2012).

[8] *Adams v. Hospira, Inc.*, No. 1,069,056, 2014 WL 3055469 (Kan. WCAB June 12, 2014).

The Board and Court of Appeals in *Gould*[9] found a claim compensable where the claimant caught his clothing on fire while lighting a cigarette. The cigarette ignited the gasoline. Just prior to the accident, claimant had been filling a chainsaw with gasoline and spilled gasoline on his shirt. At the time of the accident, claimant was clocked in and at the work site waiting for another employee to complete a task.

The Court of Appeals wrote:

> Thus, the Board did not erroneously apply the law in finding Gould's injury arose out of and in the course of his employment. Gould's work required him to work with gasoline. That gasoline spilled on his shirt and later caught on fire, a risk distinctly associated with his work. At the time of the incident, Gould was on a short, authorized break. He was attending to a personal comfort, making his activities an incident of his employment. Because his actions were causally connected to his job, and he was working at the time of his injury, the Board properly found his injuries were compensable.[10]

Additionally the Court found:

> At the time of his injury, Gould was no longer refueling chainsaws. He was, however, on the clock and continuing to perform the requirements of his job. Thus, the injury occurred within the course of his employment, and nothing in the KWCA suggests switching job tasks severs causality.[11]

Historically, a cigarette break has been considered analogous to a coffee break, and the personal comfort doctrine would control.[12] In 2011 the Act was amended to specifically exclude injuries arising out of a risk personal to the worker, and the provision was added to require a specific finding of a causal connection between the conditions under which the work is required to be performed and the resulting accident.

Notwithstanding the Court of Appeals' use of the phrase "personal comfort," which is not to be found in the Act, the Court's analysis centered on the relationship of the claimant's work and the accident. The Court related the fire directly to a work-related activity (putting gas in the chainsaw). *Gould* does not apply because claimant's injury by accident in this claim bears no such relationship to a work activity. Had claimant not

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[9] *Gould v. Wright Tree Serv., Inc.,* No. 114,482, 2016 WL 2811983 (Kansas Court of Appeals unpublished opinion filed May 13, 2016).

[10] *Gould* at 8.

[11] *Id.* at 5.

[12] See *Jarred v. Swift Transportation Inc.*, No. 1,016,130, 2004 WL 1517773 (Kan. WCAB June 29, 2004); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

assumed the risk, personal to him, of walking across an icy parking lot, driveway and street to satisfy his personal need for a cigarette, he would not have suffered this injury by accident. The undersigned finds there was no causal connection between the conditions under which the work claimant was required to perform and the resulting accident. Claimant's injury arises out of a personal risk.

CONCLUSION

While there is not a consensus among the five Board Members, the undersigned finds, based upon the facts contained in the record, claimant failed to prove he suffered an injury arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 7, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Kenneth J. Hursh, Administrative Law Judge